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IN THE

Supreme Court of the United States

October Term, 1964

No. 1075

WALTER R. HEARNE AND STANLEY E. WHITMAN,

Appellants,

vs.

ROBERT E. SMYLIE, Governor of the State of Idaho; ARNOLD WILLIAMS, Secretary of State, State of Idaho; ALLAN G. SHEPARD, Attorney General of the State of Idaho; JOE R. WILLIAMS, Auditor of the State of Idaho; MARJORIE RUTH MOON, Treasurer of the State of Idaho; LEON FAIRBANKS, MARVIN E. WRIGHT and ROY MURPHY, County Commissioners of Ada County, State of Idaho; VERN THOMAS, Auditor of the County of Ada, State of Idaho; EMMETTE SPRAKER, JAMES A. ABBOTT, and PAUL GREGERSEN, County Commissioners of Bannock County, State of Idaho; and SARAH DEVANEY, Auditor of the County of Bannock, State of Idaho,

Appellees.

On appeal from the United States District Court for Idaho, Southern Division

MOTION TO DISMISS OR AFFIRM

ALLAN G. SHEPARD
Attorney General of the State of Idaho

M. ALLYN DINGEL, JR.
Assistant Attorney General of the State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

227 State House
Boise, Idaho

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, Arnold Williams, Allan G. Shepard, Joe R. Williams and Marjorie R. Moon pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the appeal be dismissed or, in the alternative, that the judgment of the court below dismissing the complaint attacking the apportionment of the membership of the Idaho legislature be affirmed.

ARGUMENT

I.

This case is unusual insofar as considerations entering into apportionment of the Idaho Legislature are concerned. Subsequent to the commencement of this litigation the Idaho Legislature in 1963 reapportioned itself on the basis of the 1960 Census. As noted by the lower court in the instant matter (225 F. Supp. at pages 651-52), this legislative action followed a decision of the Idaho Supreme Court in the reapportionment suit of *Caesar v. Williams*, 84 Idaho 254, 371 P. 2d. 241 (1962). The history of the Idaho Legislature reveals that this elected body has recognized its responsibilities toward reapportionment. The Legislature has periodically reapportioned itself, doing so in 1917, 1933, 1941, 1951, and again in 1963. Yet, appellants' second cause of action claims these various statutes, ". . . constituted over the period a continuing systematic device to perpetuate majority control of both legislative houses by a minority of residents in Idaho . . ." (Appellants' jurisdictional brief, page 8.) Again, on page 16 of their brief, appellants state that, ". . . the malapportionment itself is, and is intended to be, self-perpetuating unless judicial relief is available." Appellants base this contention on their supposition that, ". . . no solution to this problem can be expected from voluntary action of the Legislature which is itself, a product of the malapportionment." (Appellants' jurisdictional brief, pages 14-15.)

The actions of the Idaho Legislature in 1963 vividly demonstrate that appellants' accusations belittling the

integrity of the Idaho lawmakers are false. House Bill No. 50, which reapportioned the House of Representatives in 1963 thereby giving larger populated counties additional representation, was passed by the House with 57 ayes, 2 nays, and 4 excused. The bill passed the Senate with 39 ayes, 2 nays, and 3 excused. This overwhelming vote displays a great wealth of bi-partisanship that tarnishes, if not totally destroys, any such contention of appellants. These appellants believe the Supreme Court of the United States will agree that the Idaho Legislature has not abdicated its political responsibility. The inference found in the following remarks of the lower court in 225 F. Supp. at page 652, emphasize these appellees' position:

> "We infer that the recent 1963 apportionment statute, under attack at bar [Idaho Code § 67-203, as amended by 1963 Idaho Sess. Laws, ch. 15, at 149], was enacted in response to the above-quoted suggestion of Idaho's Supreme Court. And, *interestingly enough*, it was conceded by counsel at the bar upon oral argument here that, since the passage of the 1963 statute, *no Idaho citizen has as yet seen fit to return to the Idaho Supreme Court to seek a determination as to the constitutionality* of the new legislative apportionment statute under Idaho's Constitution." (Emphasis added.)

II.

The lower court easily disposed of appellants' contention that the legislative apportionment violated the due process clause of the Fourteenth Amendment. "The argument in support of this contention complete-

ly escapes us and, in our opinion does not merit discussion." 225 F. Supp. at page 650.

Appellants took up the bulk of the one day trial with attempts to place into evidence, materials offered to prove that the apportionment formulas violated the due process clause. Appellants' third cause of action alleged this violation and it is stated as Number 6 in their "Questions Presented" before this Court. These appellees submit that the decision in *Baker v. Carr*, 369 U. S. 186, 82 S. ct. 691, 7 L.ed. 2d. 663, did not go any further than to uphold the jurisdiction of the Federal Courts as to reapportionment cases alleging deprivation of the constitutional right of equal protection under the Fourteenth Amendment.

Furthermore, as Mr. Justice Frankfurter pointed out in *Gomillion v. Lightfoot*, 364 U. S. 339, 343, 81 S. ct. 125, 128, 5 L.ed. 110, 114 (1960):

> ". . . if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers."

In the 1963 decision of *Lisco v. Love*, 219 F. Supp. 922 (D. Colo.), which has been recently argued before this Court, the three judge panel made the following observation:

> "For all practical purposes the Supreme Court has foregone the application of the Due Process Clause in substantive matters unless an impinge-

ment on some absolute civil right occurs. Although the right of franchise is 'a fundamental political right, because preservative of all rights,' no provision of the Federal Constitution of which we are aware makes it an absolute right or forbids apportionment of a state legislature on a basis other than one-man one-vote. *Baker v. Carr* speaks in terms of 'rationality' and 'invidious discrimination.' The use of these terms precludes the existence of an absolute right." 219 F. Supp. at page 926.

III.

Appellants' first "Question Presented" is whether the District Court could refuse to make a decision on the merits in exercising its jurisdiction under the Declaratory Judgment Act. On page 13 of their brief appellants state this case poses for the first time whether a lower court in exercising its discretion could *avoid* a decision on the merits. But these appellees submit appellants have overlooked the following statement of the District Court:

> "We have considered the briefs of counsel, as well as such 'evidence' as was adduced upon the 'trial' of this cause, and have concluded that the only proper course is for this Court to exercise its discretion against making any declaratory judgment. Several reasons impel us to this conclusion." 225 F. Supp. at page 649.

These appellees cannot improve upon the clarity of the District Court's language in enunciating the numerous reasons, and in the interest of brevity appellees will not elaborate to any great extent on the cogent opinion of the court below.

IV.

One who directs a frontal attack upon the constitutionality of a law through the use of the equal protection clause of the Fourteenth Amendment must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Mr. Justice Stewart's concurring opinion in *Baker v. Carr*, 369 U. S. 186, 266, 82 S. ct. 691, 737, 7 L.ed. 2d. 663, 714 (1962) discusses this burden:

> "In *MacDougall v Green*, 335 U S 281, 93 L ed 3, 69, S Ct 1, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' 335 U S, at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan v. Maryland*, 336 U S 420, 425, 6 L ed 2d 393, 399, 81 S Ct 1101. *In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' Metropolitan Casualty Ins. Co. v. Brownell*, 294 U S 580, 584, 79 L ed 1070, 1072, 55 S Ct 538." (Emphasis added.)

The only evidence adduced at the trial by appellants was the raw population statistics of Idaho's forty-four counties. These appellees believe the holding in *Baker v. Carr* does not stand for the proposition that such cold statistics alone are sufficient to carry the burden.

The statistics themselves do not demonstrate that the legislature's actions have resulted in "invidious discrimination" violating the equal protection clause. The District Court at pages 654-55 adopted the pointed language of Mr. Justice Douglas in *A. F. of L. vs. Watson*, 327 U. S. 582, 593, 66 S. ct. 761, 766, 90 L.ed. 873, 880, (1946), in stating a federal court of equity should interfere with the enforcement of state laws only "to prevent irreparable injury which is clear and imminent." Continuing, on page 645 the District Court said:

> "There is *nothing in the record* here which even tends to persuade us that any claimed injury to plaintiffs is 'irreparable' or 'clear' or 'imminent'." (Emphasis added.)

Thus, the court dismissed the claim for injunctive relief upon the ground of the appellants' failure to allege or prove a claim for which effective relief could be granted.

CONCLUSION

These appellees submit that appellants sole contention is that any deviation in population violates the Fourteenth Amendment. Appellants instituted this suit in the wake of *Baker v. Carr* and thus carry the onus of sustaining the burden of proof at the trial of this matter. The only relevent evidence adduced at the trial in the instant matter pertained solely to population statistics. These appellees believe that the State of Idaho's geographical divisions such as mountain ranges, river basins, accessibilities, homogeneity, and

problems of transportation and communication do not lend themselves to the solution that appellants attempted to obtain in their one day trial.

These appellees respectively ask this Court to dismiss the appeal or in the alternative to affirm the District Court's judgment.

Respectfully submitted

ALLAN G. SHEPARD,
Attorney General,
State of Idaho

M. ALLYN DINGEL, JR.,
Assistant Attorney General
State of Idaho

Counsel for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON.

PROOF OF SERVICE

I, Allan G. Shepard, Attorney General of the State of Idaho, and one of the Attorneys for Appellees, ARNOLD WILLIAMS, ALLAN G. SHEPARD, JOE R. WILLIAMS, MARJORIE RUTH MOON herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June 1964, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto by mailing copies

in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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